IN THE

Supreme Court of the United States

No. 779. In Equity.

CENTRAL KENTUCKY NATURAL GAS COMPANY,
Appellant,

vs.

RAILROAD COMMISSION OF KENTUCKY ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Kentucky

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REPLY BRIEF FOR THE APPELLEES

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REPLY BRIEF FOR THE APPELLEES

Before going into their reply brief, appellees desire to direct the concentrated attention of the court to certain figures in the record, so obvious and so convincing as that the failure of appellees' original brief to discuss them is embarrassing. Will the court please turn to page 116a of the transcript? It is the work of appellant's expert, Mr. Kimball.

Let us go to the next to the last column on that sheet. Mr. Kimball's oath is that the company, selling gas in 1926 at 40c, had a net operating revenue, for amortiza-

tion, depletion, extraordinary maintenance and dividends, of $196,232.00. From that we may deduct the $75,263.00 allowed by the trial court for amortization and extraordinary maintenance (the figures are in the opinion, but are more succinctly collated at page 41 of appellant's main brief); and we have left for dividends, $120,969.00. But that is only a part of it; for this calculation by Mr. Kimball *is on gas sold at 40c.* Now the sales rate fixed by the Commission, and left in effect by the decree below, is *45c.* So, going to the top of this same column, and finding that gas sales at 40c realized income of $522,349.00, we at once perceive that the same gas sold at 45c would have realized ⅛ (5c=⅛ of 40c) more; and ⅛ of $522,349.00 is $65,293.00. So for 1926, as on Mr. Kimball's own figures of income, but adjusted to the 45c price of the Commission, and the trial court's ascertainment of charges before dividends, we have this result:

Amount available for dividends, *supra*.	$120,969.00
Plus 5c increase by the Commission.....	65,293.00
Net for dividends.....	$186,262.00

This figure is Mr. Kimball's figure, modified only by an inexorably correct 5c per M. addition to income, to conform the sale price to the 45c of the decree. Mr. Kimball (Tr. p. 111) says he took these figures from "operating reports of the Central Kentucky Natural Gas Company." Now let us note:

(a) The trial court, from its own deductions from the record, found a net income available for return in 1926, of $144,574.00 (Tr. 89).

(b) But there was all the while in the record, the actuality from the company's own books.

(c) This actuality of net income thus apparent for 1926, was $186,262.00, based upon a 45c rate.

(d) $186,262.00 is near 8½% on the trial court's rate base value (Tr. p. 83) of $2,198,107.00.

(e) The trial court's allowance for amortization, extraordinary expenses, etc., the $75,263.00 of this calculation, is accepted by appellant. Its main brief (p. 12) says "no complaint is made by appellant of these findings."

(f) The appellant (its main brief, p. 12) likewise avowedly makes no complaint of the rate base of the trial court.

(g) So on figures that are acceptable to appellant, and on its own actual experience, as taken by its own report from its own books, the agreed year of 1926, with gas selling at 45c, produced it 8½% of income.

Note again, please, these are the appellant's own figures of income. They are the trial court's figures of amortization, and extraordinary upkeep, by appellant's specific statement not the subject of complaint. When these figures of its own experience were copied from the company's books, and when they were put into the record by appellant's expert, they were designed to manifest a pitifully inadequate income; for the appellant (see its Bill of Complaint, Tr. p. 16) then asserted that the properties utilized by it for Lexington were worth $6,340,895.00, as of December 31st, 1926, those very same properties valued as of the same date by the court at $2,198,107.00 (Tr. p. 85); and "no complaint is made of this finding," says the appellant's brief, at p. 12. The

appearance of the figures now is probably inadvertent; for they pretty well go to the demolition of appellant's case.

We are not unmindful that the figures are on gas costs to appellant before it began to buy the high priced Owsley County gas, but it was as well before other compensating high priced gas went out of the picture, all of which appears at length on pages 43-4 of our main brief. And again, and always, it is to be remembered that appellant (though it now protests the fact) asked the trial court (see the quotation from its brief at pages 41-2 of our main brief) to accept this December 31, 1926, date for its decision. And again, and always, it is to be remembered that the trial court (Tr. p. 90) wrote this:

> "Upon the hearing of this cause the parties requested the court to fix the base value of plaintiff's properties allocable to Lexington as of December 31, 1926, and determine whether the rate established by the Commission *is a reasonable rate on such values as of said date.*" (Italics ours.)

So it is submitted that upon a rate base acceptable to appellant, its own exhibit of its general operating costs from its own books, allowances for amortization and upkeep as well acceptable to it, it actually and mathematically earned in 1926, upon gas sales computed at the decretal rate of 45c, the sum of $182,262.00, near 8½% on the rate base.

We might well content ourselves with the foregoing exact demonstration from the record. But the appellant's reply brief, in its opening, says that its authors have difficulty in following the reasoning of, and in dis-

covering the relevancy of the authority cited in, our brief in chief. We realize that so critical a statement would not have been made without something of justice behind it. At any rate, it moves us to simplify, and to concentrate the quantity (at least) of, our main brief, and to endeavor to clarify what we endeavored to say in our main paper.

First. This suit, brought in the District Court, attacks a natural gas rate fixed upon full hearing and trial by the Railroad Commission of Kentucky, a constitutional body, empowered to hear and fix rates. Let us go to appellant's own bill to find portrayed the events before the Commission; and here is what the bill says (Tr. p. 5):

> "Said complaint was duly heard by said Railroad Commission under and by proper pleadings, and testimony and evidence was introduced and offered by both the complainants and this company, and said case was submitted on the pleadings, proof and exhibits introduced by the parties thereto, * * * and written briefs were thereafter filed by the respective parties."

And further (Tr. p. 12 and following, from the bill) that the Commission found

> "that a flat rate and charge of forty-five (45c) cents per thousand cubic feet * * * is a fair and reasonable rate and charge."

Our relevant reasoning is that such a trial, such a hearing, as are thus expressly asserted by the appellant to have been had by it before Kentucky's constitutional rate-making body, afforded it due process of law. And a rate decision emanating from that trial cannot be a

taking without due process of law. This court has considered heretofore whether hearings before this same Kentucky Railroad Commission afford due process. It has answered the question affirmatively no less than thrice. Will the court please refer to these cases, and our main brief's discussion of them, at pages 18 to 22?

Louisville and Nashville Railroad Co. vs. Finn et al., as the Railroad Commission of Kentucky, 235 U. S. 601, s. c. 59 L. Ed. 379.

Louisville and Nashville Railroad Co. vs. Kentucky, 183 U. S. 503, s. c. 46 L. Ed. 298.

Louisville and Nashville Railroad Co. vs. The Railroad Commission of Kentucky, 231 U. S. 298, s. c. 58 L. Ed. 229.

Now, however much of merit there may be in the appellant's claim of inability to follow the reasoning of the appellees, it surely should be easy for it and its counsel to understand what the court wrote in the cited cases dealing with the due process nature of rate decisions by that same Kentucky Railroad Commission with which it deals here. What the opinions say on the subject is set out at pages 18 to 22 of our main brief. Will the court please turn to these pages? What the opinions seem to us to say, and what, mincing no words, they do say definitely, exactly, clearly, is that hearings like this one before the Kentucky Commission are due process hearings. Our *sequitur* is that the three-judge court, in trying this case *de novo*, did what it had no right to do. It substituted without right its own views upon fair rates for those of another due process body, rightfully arrived at.

Second. Appellant comprehended the foregoing. It knew it could not get away from the Commission's due process rate, duly arrived at; and by an amendment (Tr. p. 59) it charged that the Commission's decision "was capricious, arbitrary and without any evidence * * * to support the same." (Cf. the fullness of the hearing as set up, *supra*, from appellant's original bill.) And upon this second point we submit:

(a) That the courts of the land are at liberty to supplant with their own views those of that due process body, The Kentucky Railroad Commission, *when, and only when,* the decisions of that due process body are without reason, and are wanton, capricious and arbitrary. Here is the authority for that statement, discussed more at length at pages 7 to 15 of our brief in chief:

Louisville and Nashville Railroad Co. vs. Kentucky, 183 U. S. 503, s. c. 46 L. Ed. 298.

Louisville and Nashville Railroad Co. vs. Garrett et al., as the Railroad Commission of Kentucky, 231 U. S. 298, s. c. 58 L. Ed. 229.

Kansas City Railroad Co. vs. United States, 231 U. S. 423, s. c. 58 L. Ed. 296.

Railroad Commission vs. Cumberland Telephone and Telegraph Co., 212 U. S. 414, s. c. 53 L. Ed. 577.

Interstate Commerce Commission vs. Union Pacific Co., 222 U. S. 541, s. c. 56 L. Ed. 308.

People ex rel. New York and Queens Gas Co. vs. McCall, 245 U. S. 345, s. c. 62 L. Ed. 337.

Interstate Commerce Commission vs. L. & N. Railroad Co., 227 U. S. 88, s. c. 57 L. Ed. 431.

But perhaps it will be easier for the appellant to follows the court's own words; so we quote this from the *New York and Queens Gas Co.* case, just *supra*:

> "The action of the Commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore * * * even if the courts differed with the Commission as to the expediency of the order, they are without authority to substitute for its judgment their views of what may be reasonable and wise."

And again, the following reasoning from the last case cited, *supra*, is assuredly easy to follow:

> "The order of the Commission * * * was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict, nor put their judgments against that of the rate-making body."

(b) That the appellant, in all that it has said here, and in all that it said and did before the three-judge court, has manifested nothing of meretriciousness in the Commission's decision. So we submit that neither the trial court, nor this court, is at liberty to substitute its own conclusions for those of Kentucky's constitutional Railroad Commission, arrived at in the exercise of a due process hearing; and that the Railroad Commission's ascertainment of a fair rate of forty-five (45c) cents

must stand unless this court, searching the record, finds that the Commission acted without evidence, and without reason; and that, it is respectfully submitted, the court can find no such thing in the narrow record that appellant, in the exercise of its unlimited right, has brought here. Appellant should not have difficulty, it would seem, in perceiving alike the sound reasoning and relevancy of this authority.

In this aspect of the matter the trial court erred, we respectfully submit. The trial court wrote (contrary to what is argued here) that the courts were at liberty to consider this *Kentucky Commission rate case de novo;* and it cites the *Ben Avon* case from the Supreme Court and the *Greenbrier* case from the Kentucky Court of Appeals, apparently in conflict with what this court had written in the several cases involving the due process nature of hearings before the Kentucky Commission. We will discuss these two cases shortly. So it may be that the court here will find it desirable, and we press upon the court how the right to a fair comprehension of its intent makes it necessary, to put at rest the supposed conflict; and to say whether a rate litigant, who has under a statute, or by agreement (Franchise Sec. II, Tr. 32), submitted its case on pleadings, evidence, argument and free hearing, to that due process body, the Railroad Commission of Kentucky, finding itself displeased with its result there, has a right to the independent and *de novo* judgment of the District Court.

There is *apparent* conflict in what the court has written. But when fair reason comprehends *all* that has been written; it finds that there is no conflict. In parallel columns we juxtapose the apparently conflicting rulings:

In *L. & N. Railroad Co. vs. Kentucky,* 183 U. S. 503, s. c. 46 L. Ed. 298, it is said:

"We are not prepared to accept the view that the Railroad Commission, in acting under Section 218, is merely an administrative body, and as such, subject to judicial review. It is rather a constitutional tribunal, empowered, upon the application of the carrier, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. It is not compulsory upon the carrier to make such application for relief to the Commission. If he does not choose to do so, he will continue to operate his railroad under and subject to the constitutional prohibition. If he elects to resort to the Commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the laws provide for a review. Nothing

In *Ohio Valley Water Co. vs. Ben Avon Borough,* 253 U. S. 287, s. c. 64 L. Ed. 908, this is said:

"The order here involved prescribed a complete schedule of maximum future rates and was *legislative in character.* In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause." (Italics ours.)

> is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them, whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers have proceeded. If there are charges of fraud, or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void."

Now many brief-writers, and not a few judicial ones, have unthinkingly seized upon this *Ben Avon* case as determining that *in every rate case,* the parties were entitled to a review in court. It decides no such thing. It was written upon a rate *"legislative in character."* Of course a *legislative* rate is open for admeasurement by the courts; for *legislation* affords no due process. And equally of course this *Ben Avon* case does not rule it, nor even hint it, that a rate arrived at upon full hearing, upon argument, upon evidence, even though it be by a body not called a "court" is *ex necessitu* wanting in due process. Let us recall again that the appellant (Tr. p. 5) says of the instant proceedings before the Railroad Commission of Kentucky:

> "Plaintiff says that said complaint was duly heard by said Railroad Commission under and by proper pleadings, and testimony and evidence was introduced and offered by both the complainants and this company, and said *case* was submitted on the pleadings, proof and exhibits * * * and written briefs were filed by the respective parties,"

and that (Tr. p. 12) the Commission thereon fixed the 45c rate. Was that rate a *legislative* rate? If it was, then the *Ben Avon* case rightly demands a hearing, a precedent due process; but if it were a rate arrived at by decision, and upon the formality of hearing portrayed by appellant, then, as within the very words of this court, due process was afforded by this hearing by the Kentucky Commission. The distinction is too obvious to require further elucidation. It will be a fortunate thing when this court has clarified the two diametrically opposite conditions, and has set the interested profession, and the subordinate judiciary, upon the right footing. We invite the court to go over the cases cited, and the quotations made from some of them, in point II, at pages 16 to 24, inclusive, of our brief in chief. To the cases there cited we add these:

People ex rel. New York and Queens Gas Company vs. McCall, 245 U. S. 345, s. c. 62 L. Ed. 337.

Interstate Commerce Commission vs. L. & N. Railroad Company, 227 U. S. 88, s. c. 57 L. Ed. 431.

New York Central Railroad Company vs. White, 243 U. S. 188, s. c. 61 L. Ed. 667.

Crane vs. Hahlo, 258 U. S. 142, s. c. 66 L. Ed. 514.

Silbershine vs. United States, 266 U. S. 221, s. c. 69 L. Ed. 256.

Virginian Railway Co. vs. United States, 272 U. S. 658, s. c. 71 L. Ed. 463.

Hardware Dealers Mutual Fire Insurance Co. vs. Glidden Co., 284 U. S. 151, s. c. 76 L. Ed. 214.

Dohany vs. Rogers, 281 U. S. 362, s. c. 74 L. Ed. 904.

Insofar as extend the range and power of our minds to comprehend them, these cases seem to be sound footing for the theory that this hearing, as portrayed by the appellant's bill, before Kentucky's constitutional due process body, constituted a due process hearing. We are aware that the trial court and the otherwise unexplained and unlimited application of the *Ben Avon* case are to the contrary. We submit that our viewpoint is sound, and that the courts have no sort of right to try again what has been duly and constitutionally tried by other tribunals set up, whether by state or federal law. But if we be wrong in this concept, we respectfully ask that the court set us right, and numberless members of the profession right, upon the subject.

And let us, once and for all, get it clear about the Kentucky case of *L. & N. vs. Greenbrier Distillery Co.*, 170 Ky. 775, the case relied upon by the lower court, and militantly relied upon by appellant here, as establishing a right to the *de novo* conclusions of the court. The opinion is long. It is more discursive than it is understandable. Appellant and the trial court overlook it that

it was written, not upon a primary rate hearing such as this, but under Section 829 of the Kentucky Statutes, *a section restricted to awards on excess charges, a section expressly providing for a court review.** The difference between Section 829, considered in the *Greenbrier* case, and Sections 201e-1 *et seq.* of the Kentucky Statutes, under which was held the rate hearing here, is patently obvious. Under Section 829 the Commission hears complaints about *past* "extortions," "discriminations," and "preferences." If it finds that there have been infractions of the statutes against these practices, it renders awards accordingly. But naturally no coercive writ can issue upon such awards; and accordingly the statute provides for actions in court to enforce the payment of the reparation awards. Upon the contrary, Section 201e-5

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*Section 829, Kentucky Statutes, runs thus:

"The (Railroad) commission shall hear and determine complaints under K. S., Sections 816, 817 and 818. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be the same as in other ordinary cases."

of the statutes,* that section under which the Commission acted in the instant case, covers hearings upon *future* rates, held upon pleadings, evidence, argument and decree, or order without any provision for court review. And the Kentucky court's animadversions in the *Greenbrier* case to the right of a court review were *upon a statute providing for such review.* They never touched upon the idea invoked by appellant. Let us be rid of the trial court's and appellant's cloud about the case; and on the subject of due process, the *Greenbrier* writer is clear enough. He writes, at page 791, that "'due process' is always had when the party has had sufficient notice and an opportunity to make his defense." But what was fundamental in the writer's mind emerges at page 791, where he says:

> "If the rate fixed is so low as to be confiscatory, the carrier may * * * have a review of the proceedings by a court, and if the action was based upon insufficient evidence and was thus arbitrarily done, it has its remedy."

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* Section 201e-5 of the Kentucky Statutes is as follows:

"Whenever a duty or obligation is imposed upon any company mentioned in this act by law which relates to the rates, tolls, fares, classification, charges, service, rules, regulations or practice of any such company, or whenever a complaint is filed alleging a violation of this or any other law relative to such company, the same shall be under the supervision and regulation of the railroad commission which shall have authority, after due notice and hearing as provided by law, to issue an order fixing just and reasonable rules or regulations or practice to be thereafter followed, and to prescribe the rate or toll to be charged or service to be performed thereafter to relieve any undue or unreasonable discrimination, prejudice or advantage found to exist in violation of law; and such rates, classifications, charges, fares, tolls, rules, regulations or practice so ordered shall be substituted for the rates, classifications, charges, fares, rules, regulations or practice then in force by any such company, and power is by this act conferred upon said commission to make and put into effect joint rates."

The writer evidences that he had read this court's three Kentucky Commission opinions, and that he was in accord with them. He meant that the courts had jurisdiction when the decisions of the Commission were so unsupported by evidence as to be arbitrary. This has been this court's position. It is our position.

Third. Appellant's reply brief does not answer, does not undertake to answer, the *calculations* submitted in appellees' brief in chief. It notices them; and at the same time it categorically declines to answer them. Its assigned reason for not answering them is that the appellees may not be heard without a cross appeal. It persists in the fallacy, in the face of this, written in *Langnes vs. Green,* 282 U. S. 531, s. c. 75 L. Ed. 520:

> "But it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

The court will find the point elaborated at pages 3 *et seq.* of our main brief, where other cases supporting the doctrine are cited. For the sake of concentration we reiterate here our argument. It is that the philosophy of *Langnes vs. Green,* and the other like cases, is sound. That philosophy is not that an appellee may, without cross appeal, *reach any result other than that of the decree.* On the contrary, it is that the appellee may reach the *same* result as that of the decree, though he may reach it by different mathematics, or a different process of reasoning. In so doing, the appellee argues not in opposition to the decree, but in support of it. And it is

rather absurd (we mean no offense by the use of the word) to argue it that we must take out a cross appeal in order to *sustain* the decree of the trial court. The appellant seeks to alter the trial court's decree in its declination to enjoin the 45c rate of the Railroad Commission. The appellees are not contesting that decree. And, in common sense, no cross appeal upon their part is required to permit them to sustain the 45c decree, though their "argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it." It is their point that the court erred in its reasoning in allowing the amortization charge of $60,000.00 per year; and it is their argument that if this unwarranted charge had been eliminated, the 45c rate of the Commission would be the rate of the court's decree, the same 45c rate which the trial court declined to enjoin.

It is, as well, their point that the trial court ignored the rule that the decisions of the Kentucky Railroad Commission are due process decisions, not to be supplanted by the court's views, unless and until the courts shall have found these decisions to be arbitrary and without evidence. That process of reasoning, as well, supports the decree of the trial court. And the reply brief for the appellant does not mention *Langnes vs. Green*, nor *U. S. vs. American Railway Express Company*, 265 U. S. 425, nor *United Railway and Electric Company vs. West*, 280 U. S. 234, all of which are in the face of the appellant's contention.

It should not be difficult, it would seem, for appellant to understand this argument, nor to appreciate the intent of *Langnes vs. Green*.

Fourth. The trial court, supplanting the views of the due process Commission by its own views, found that a fifty (50c) rate was fair; but it conditioned the granting of an injunction against the Commission's forty-five (45c) cent rate upon appellant's consenting to the court's 50c rate. The condition was rested upon the equitable maxim that he who seeks equity must do equity. And on this it is submitted:

(a) That the trial court, under the authority *supra,* had no right to exercise its own faculties upon reasoning out any 50c, or other, rate, until and unless it found the Commission's act to have been wantonly disregardful of the record.

(b) And that if it had such right, it had the further right, at one and the same time, to do justice and concomitantly to exact justice. This rate case had been pending more than five years. The ultimate right to several hundred thousand dollars of impounded money awaited the case's end. The trial court felt that there should be an end to it. These authorities support the application of the named maxim in rate cases:

Public Service Railway Co. vs. Board, 276 Fed. 979, 990, a three-judge case from New Jersey.

City of Toledo vs. Toledo Railway & Light Co., 259 Fed. 450, 458, C. C. A., 6th Cir.

Consolidated Gas Co. vs. Newton, 267 Fed. 231, D. C. S. D., N. Y.

Newton vs. Consolidated Gas Co., 258 U. S., 165, s. c. 86 L. Ed. 538.

In the Sixth Circuit *Toledo* case (this case is from that circuit) the court, composed of Judges Warrington, Knappen and Denison, wrote this:

> "It is likewise plain that, when an injunction is asked to restrain the enforcement of an unreasonable rate, the court may make its order conditional upon the doing of equity by plaintiff to consent to charge no more than what seems to the court to be reasonable."

It should, it seems, be easy to follow the reasoning, and to discover the relevancy, if not of the discussion, at least of the authority. The appellant declined to accept the too generous condition of the court.

Fifth. The condition was too generous. The trial court (Tr. pp. 87-8) in its opinion made these annual allowances as deductible by appellant each year before income:

(a) Fifty thousand ($50,000.00) dollars per year for amortization of its own properties.

(b) Ten thousand ($10,000.00) dollars per year for amortization of the Lexington Utilities distribution system *leased by,* and *not owned by,* the appellant (see leasing contract printed in a separate pamphlet as an *addendum* to the transcript, pages 267-273).

(c) Ten thousand ($10,000.00) dollars per year for extraordinary upkeep of appellant's property over and above all proven past experience of the amount necessary for upkeep.

(d) Five thousand ($5,000.00) dollars per year for the like upkeep of the distribution system, leased but not owned by appellant.

The total of these annual allowances is seventy-five thousand ($75,000.00) dollars. With all due respect we submit that, and we submit that the record sustains us in the charge that, not one dollar of this sum is sustainable by the record. We take up the four items:

Upon (a). The trial court allowed this $60,000.00 for amortization upon the assumption, the pure assumption, without one word of proof behind it (for this charge of an actuality see our main brief, pp. 69-70) that appellant's gas supply would be exhausted by January, 1947, the end of the franchise contract. It allowed it in the face of appellees' proof, *absolutely the only proof in the record on gas supplies,* of a hundred years' available supply, and in the face of a map (the map is filed here) of the Columbia's own printing, showing that all the parent Columbia Company's inexhaustible West Virginia and Kentucky supplies had direct delivery connections with the Lexington vents. It allowed the charge upon the assumption that the transportation and distribution lines would be valueless at the end of twenty years, in the face of a provision in the franchise contract itself for the substitution of artificial for natural gas. It allowed it without even speculation behind the allowance. It just allowed it. Appellant rests here upon this fifty thousand ($50,000.00) dollar annual allowance to retire at the end of the franchise, at its full rate base value, its own property then and now in perfect condition. And it introduced no word, no expert, no hint, to justify the allowance. Literally, absolutely, exactly, it introduced not one word of proof about gas supplies. Circumstanced as it was with unlimited supplies at its command, it may be that it dared not submit the facts.

On no other conceivable ground can its silence be explained. This court, in *Knoxville vs. Knoxville Water Company,* 212 U. S. 1, s. c. 53 L. Ed. 371, said this:

> "If a company of this kind chooses to decline to observe an ordinance of this (rate) nature, and prefers to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would be so confiscatory in its effect as to violate the Constitution of the United States."

And in the recent *Los Angeles* case, 289 U. S. 287, this is said:

> "The question is whether the rates are confiscatory. And upon that question the plaintiff has the burden of proof."

It is fair to assume from its silence that, in the quoted words from the *Knoxville* case, it was not "prepared to show" any possible or probable gas exhaustion.

Upon (b). Why should the appellant be permitted to amortize the value of a plant which it does not own? Is not ownership a fundamental for amortization? Should the Lexington plant be wholly useless at the end of the franchise because of any fancied and fanciful exhaustion of gas, the appellant would be nothing out of pocket. The loss would be that of the Lexington Utilities Company owning the plant, not that of the appellant, without a penny of ownership in it. Is it worth while to argue further that there is no justice in amortizing to appellant the value ($611,227.00, Tr. p. 84) of something of which it owns not a farthing?

Upon (c). Mr. Kimball's table, at page 116 (a) of the transcript, shows the actual expenses of the company for upkeep. The trial court allowed them. On top of them it allowed $10,000.00 more. It allowed it in the

face of appellant's witness, Mr. Von Gemmigen, who says (Tr. p. 228) that "maintenance offsets depreciation," and in the face of Mr. Kimball's statement (Tr. p. 227) that "taking the property as a whole, it remains in practically the same condition from year to year by reason of the replacements and extensions, that is, the expenditures made upon it during the year." So it does not seem to be just to allow $10,000.00 annually for extraordinary upkeep upon a property already kept in perfect condition by the ordinary upkeep allowances.

Upon (d). If it were conceivable that the like extraordinary allowance could possibly be justified as upon the leased properties, will the court please observe, in the pamphlet addition to the transcript, how at pages 271-2, the lessee, the appellant, is given each year, in its rental payments to the lessor company, a credit of $10,000.00 to cover, *inter alia*, "the care, supervision and maintenance of the plant," an allowance nowhere taken stock of in the calculations of the trial court?

Here is the mathematical result:

$75,000.00 per annum is 5 7/10 cents per thousand upon the 1,300,000 M. c. f. (Tr. 136b) sold in 1926. It is near 6 4/10 cents per thousand on the 1,175,954 M. c. f. (Tr. 136c) sold in 1927. 5 7/10 cents deducted from the trial court's 50-cent rate results in a rate of 44 3/10 cents as just for 1926. 6 4/10 cents deducted from the court's 50-cent rate results in a rate of 43 6/10 cents as just for 1927. Both are substantially below the 45c of the Commission.

It would seem that the appellant should not find difficulty in following this reasoning, or in discovering its relevancy.

There is yet another and complete reason against the allowance of any part of this amortization charge:

When first, after its purchase of the Central Kentucky Company, the bookkeeping methods of the Columbia Company were applied to the Central's books (testimony of Assistant Treasurer Hightower, Tr. 237), it was disclosed that the appellant had built up a fund of $1,662,062.69 (see balance sheet, Tr. p. 217), denominated by the Columbia as "Renewals, Replacements, and Depletion." It is fair to assume that as of December 31, 1927, this built-up "Depreciation" fund related back to December 31st, 1926, as the December 31, 1926, balance sheet (Tr. p. 213) expressly related back to 1925. And applying to the "Renewals, Replacements, and Depletion" the same terminology applied by appellant as of December 31, 1926, the "Depreciation" item amounts to $1,662,062.69, as by the appellant's own balance sheet records.

The trial court gave no consideration whatsoever to this record fact. It allowed an annual charge of $60,000.00 to amortize completely the entire Lexington value of the Gas Company's own and its leased properties, *overlooking in entirety* the existence of this depreciation fund already built up by the company at the expense of its customers, substantially equal to the entire rate base value ($1,586,880, Tr. p. 84) allocable to Lexington, a value of which the Gas Company makes no complaint here. So the effect of the annual charge, if it were otherwise permissible, is to let the Gas Company doubly amortize its property, already amortized, or depreciated, by a reserve of $1,662,000.00, and as well, kept by an extra annual expense allowance at 100% condition.

In *Smith vs. Illinois Bell Tel. Co.*, 282 U. S. 133, 158, s. c. 75 L. Ed. 255, 268, and in Mr. Justice Brandeis' dissent in *Pacific Gas & Electric Co. vs. San Francisco*, 265 U. S. 403, s. c. 68 L. Ed. 1075, and in *Los Angeles Gas & Electric Corp. vs. Railroad Commission* (May 8th, 1933), it is recognized that, while "the company's depreciation reserve could not be used to support the imposition of a confiscatory rate," the fact of the existence of the accumulated reserve "did not make it necessary for the Commission to make an annual allowance which in the light of experience would be excessive" (quoted from the *Los Angeles* case, 289 U. S. 287).

Again: this "Depreciation Fund" of $1,662,062.00 had already been built up by the appellant before the very beginning of the twenty-year franchise involved in this litigation. Let us put out this sum at 4% compound interest (the rate of the trial court, Tr. p. 83, not complained of by appellant) for the twenty years of the franchise; and since $1.00 at 4% compound interest for twenty years equals $2.191, then $1,662,062.00, multiplied by that factor, will equal at the end of that time, $3,641,577.84. Now, the total value of *all* (not the 55%, plus, allocable to Lexington) appellant's properties, as fixed by the trial court (Tr. p. 83), is $2,880,000.00. The appellant expressly accepts that value. The total value of the Lexington Utilities Company's properties, as fixed by the trial court (Tr. p. 84) is $611,227.00. That is the value of appellant's expert Kimball; and appellant accepts that value. The total of both values (and not just Lexington's portion) is $3,491,227.00, a sum less by $150,350.00 than the appellant's self-declared depreciation fund (already built up at the beginning of the

twenty years) will amount to at 4%, compounded, when the franchise ends. And when it ends, the appellant will yet have its property, in excellent condition, to supply its already owned abundant commodity to the citizens of Lexington, under its perpetual lease of the Lexington Utilities Company's perpetual right to distribute gas there.

In view of the $1,662,062.00 of depreciation reserve, and of these reflections about it, it is submitted that the allowance of the $60,000.00 per annum for amortization is excessive as to every dollar of it.

It would seem that this is both relevant and comprehensible.

Sixth. Appellant manifests a good deal of needless solicitude over the date (December 31, 1926) as of which the trial court reached its conclusion. Appellant invited, in direct, clear and exact words, the court to use that date, and its subsequent complaint is not to be justified, we submit. Naturally, the date, in a world of fast-changing conditions, is relevant. So let us, as briefly as may be, consider this subject of the time.

The franchise contract was made in January, 1927. Each side, in the preparation of the case, naturally addressed its basic annual proof to the year just ended on December 31st, 1926. Note, please, these facts:

(a) Appellant's expert, Kimball, made up his complete reproduction and operating expenses as of that year.

(b) Appellant's bill (Tr. p. 16) twice says that December 31st, 1926, was "the day certain in this case"

(c) The date was adopted at the invitation of the

parties, if we may rely upon the trial court's explicit statement. The opinion (Tr. p. 84) says that "both parties desired the valuation to be fixed" as of December 31st, 1926; and that "we are asked to fix the rate base and determine the income as of December 31st, 1926."

(d) The trial court, questioned upon the accuracy of this statement, reiterated and emphasized it, in its response (Tr. p. 28) to a petition for rehearing, thus:

> "The parties requested the court to fix the base values of plaintiff's properties allocable to Lexington as of December 31, 1926, and determine whether the rate established by the Commission aforesaid is a reasonable rate on such values as of said date."

(e) It would seem that the trial court was exact in its reiterated statement. It had before it the Gas Company's brief. A copy of it is filed as an appendix to our brief in chief. At pages 65 *et seq.*, of that paper, appear these words from the Gas Company:

> "We desire to direct the attention of the court to the fact that both parties have by common consent adopted December 31, 1926, as the date on which the value of the used and useful property should be ascertained, that being the nearest convenient and practicable date to the contract date. * * * *It is inherently necessary that the just and reasonable rates and charges must be as of the contract date.*"

The court will please read *in extenso*, what more was said by the Gas Company, at pages 41-2, of our brief in chief.

Faced by these words of its own, the Gas Company, by a good deal of argument, longer indeed than plaus-

ible, would have it that the trial court should not have done the exact thing that appellant's own words asked it to do.

It should not, it seems to us, be difficult for the appellant to follow and discover the relevancy of the December, 1926, date. The matter is discussed in detail at pages 27 to 43 of our brief in chief. Nor should it be thought irrelevant that we should ask that the Gas Company be estopped by, be held to, what it asked of the trial court. See *Davis vs. Wakelee*, 156 U. S. 680, s. c. 39 L. Ed. 578.

Seventh. But out of an instinctive following of the path that the trial court and the appellant advisedly, deliberately, and definitely took down until the case had been decided, we are all unduly exercised about this date; *for if a later date be taken, the results will not be different.* So let us go into that:

(a) The Gas Company now wants a later date because, in November, 1927, following the January contract, it began to buy for distribution a considerable quantity of what is known in the record as the Owsley County, or Petroleum Exploration, gas at a cost to it of forty (40c) cents per thousand; and its grievance now is that the trial court did not consider this higher gas cost expense in its adoption of the requested date of the prior December 31st. The opinion below remarks (Tr. p. 85) how, asked to decide as of December 31st, 1926, it must decide on the then conditions. That seems tritely just. But, if it were otherwise, and if the figures had been made up after the Owsley County gas came in, the Gas Company would gain nothing. Why? *Because contemporaneously other high-priced gas went out.*

When the Owsley County gas came in, the other chief source of supply of the appellant was the United Fuel Gas Company, which was a one hundred per cent subsidiary of the Columbia Gas and Electric Corporation. And in the same November, 1927, of the coming in of the Owsley County gas, the Columbia (Tr. p. 208) bought the appellant Central Kentucky Company. So after November, 1927, the Columbia was both the buyer and seller of this other high-priced gas. And appellant now seriously seems to contend that it has the right (a) to a rate increased by the coming in of the Owsley County gas, and (b) that, at one and the same time, it has the right to include in its expense charges the high-priced gas that it was buying from itself. It would eat its cake and have it, too, notwithstanding that this inter-company fictional charge has been denounced by every court that has dealt with the matter. Among other such thumbings-down is the recent Kentucky natural gas case of *United Fuel Gas Company vs. the Railroad Commission of Kentucky*, 278 U. S. 300, where it is said:

> "A public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary."

The litigants in the quoted case were the United Fuel Gas Co., owned by the Columbia, just as the appellant here is owned, and that same Kentucky Railroad Commission, the work of which is under assault here.

And just why and how, in the face of *Western Distributing Company vs. Public Service Com. of Kansas*, 285 U. S. 119, s. c. 76 L. Ed. 655, the appellant yet contends that it has the right to charge this inter-subsidiary

high rate, without evidence of its propriety and fairness, is, in the words of small Alice, "curiouser and curiouser."

The result of counting in the post-contract Owsley County gas, and counting out other high priced gas which the appellant, with its post-merger abundant Columbia supplies, was under no obligation to buy, is calculated out at pages 57 to 59 of our brief in chief. They demonstrate that the appellant would be hurt, not helped, if it secured now, contrary to its position below, the post-contract conditions of November, 1927, and later. The relevancy of this observation seems obvious enough.

Appellant, at page 21 of its reply brief, quotes our brief below to show that it included Mr. Carter's calculation of the high priced Owsley County gas, in these words:

> "Cost of 750,000,000 cu. ft. gas purchased (Owsley Co.) @ 40 cts. per M.....$300,000"

Then the appellant's reply brief follows this quotation with a row of stars across the page, thus:

* * * * * * * * * *

Would appellant have not been fairer if it had been candid enough, in lieu of its starred elision, to print this which actually appears next in our brief below?

> "Cost bal. gas purchased 1,069,261,000 cu. ft. @ 12½ cts. per M (more on this later) .....$133,657.62"

And does not a sort of innate sense of inquiry after all the truth, lead us to consider why this second item (disclosing the balance of the cost of all the gas) was omitted from appellant's reply brief? Note the explana-

tory "more on this later" in appellant's omission. This "more" appears on pages 31-6 of our brief below (filed here by appellant) where it is explained that if the Owsley County gas be counted in, the Columbia-United Fuel intersubsidiary high priced gas is to be counted out. It is discussed as well in detail at pages 43-47 of our brief in chief here, to which the attention of the court is invited.

Eighth. And something more on this date subject. If the appellant be entitled to a decision as of a date later than that to which the court addressed itself at the appellant's invitation, then, according to appellant's assignment of error No. III, it should have a decision as of the date of the trial court's decree. Now the date of the decree is September 22, 1932. In September, 1932, the depression, "which constituted a new experience to the present generation" (*Los Angeles* opinion, 289 U. S. 287), had reached its depth. The trial court had the right to apply its own knowledge, its judicial knowledge, to an ascertainment of the then conditions. We have collated in our original brief at pages 34 to 40, inclusive, the discussion and authority upon the subject of judicial knowledge; and no man can be so blind as to be unaware of what the depression did to values, labor costs, material prices, and the like. Indeed, about the only thing unaffected by it was the price at which the appellant continued to sell its gas. If, as appellant would have it, the decree's rate be rested upon depression times, here is rather an interesting manifestation of their effect upon the cause of the appellant: by a calculation to be found in the court's opinion at page 83 of the transcript, it ap-

pears that the capital stock of the Central Kentucky Company, in the fall of 1927, was exchanged on the basis of 2¼ shares of Central for 1 of Columbia preferred, on the market value of $108.00 per share for the Columbia preferred. Now, as from our current knowledge of the times, we learn that the Columbia preferred has sold in recent times for less than $60.00, and we shall be infinitely more than fair if we allot to it a depression value of $70.00. As measured by the 2¼ for 1, we would have, at $70.00 for the Columbia, a value of $28.00 for the Central Kentucky, equaling, for the 60,000 shares, a total value of the Central Kentucky property to be $1,680,000.00. To that sum we allocate the figure of 55.1% for Lexington (Tr. p. 83); and we have a resultant depression value for the Central Kentucky property at Lexington to be $925,680.00. To this we may add (generously taking no stock of the effect of the depression) the court's ascertained value (Tr. top page 85) of the Lexington Utilities properties leased by the appellant, $611,227.00 in amount; and we have a resultant Lexington rate base depression value of $1,536,907.00, some 30% less than the court's December 31, 1926, value of $2,198,107.00 (Tr. p. 85). With the gas rate to the consumer the same, the increased rate of return on the depression value is obvious.

In making this last foregoing comparison, it is to be remembered that the trial court's opinion considers all the testimony upon value and finds it to be (Tr. pp. 83-4) substantially that represented by the $108.00 value of the Columbia stock at the time of the sale; and it is not unfair, it is thought, to use its depression value as a fair test of the actuality of rate base values during the

depression period. So, again, it is submitted that the appellant is in deeper trouble if it should get a decision as of September, 1932. Its failure to get it is a cause for an assignment of error by it, but the company stands strangely mute about that date when it comes to its argument.

It would not seem to be difficult to comprehend an argument that the court might take stock of the depression, nor to appreciate either its relevancy, or that of the authority, upon the subject.

Ninth. We endeavor now to make clear our position about, and the apposite authority upon, the rate of return.

One rule is that the rate of return may very well be measured by the current investment rate in the locality served. We cite:

City of Huntington vs. Public Service Commission, 89 W. Va. 703, s. c. 110 S. E. 192. Here Judge Ritz, then president of the Public Service Commission, now general counsel for appellant, wrote this:

> "Every one concedes that the rate of interest which the utility is required to pay for money that it borrows is in a large sense a measure of the return to which it is entitled. I cannot agree that a rate is reasonable which will produce to the stockholders, after paying all expenses, all fixed charges and taxes, a return largely in excess of what other people receive upon their money in investments no less stable and reliable."

The courts will take judicial notice of the markets, and of the statutes of the several states; so

(a) The Wall Street daily markets indicate that the parent Columbia Gas and Electric Company floated its debentures at 5%.

(b) Under Sections 2218-9 of the Kentucky Statutes, the collection of more than 6% interest is denounced as illegal.

These measures of borrowing rates and local interest rates have been frequently approved of as fair. They are accepted as such in *Bluefield Water Co. vs. Public Service Commission*, 262 U. S. 679, s. c. 67 L. Ed. 1176; *Denver vs. Denver Union Water Co.*, 246 U. S. 178, s. c. 62 L. Ed. 649; *Willcox vs. Consolidated Gas Co.*, 212 U. S. 19, s. c. 53 L. Ed. 382; *United R. & E. Company vs. West*, 280 U. S. 234, s. c. 74 L. Ed. 390, and many other authorities, both state and federal. And it is submitted that 6% for return is fair, equalling $132,000.00, minus, upon the trial court's rate base of $2,198,107.00. Let us get the trial court's results on the rate base and expense allowances of which appellant makes no complaint; and at Tr. pages 88-9, we add the court's ascertained return of $120,909 at 40c for gas, to its like return of $144,574 at 50c for gas, and dividing by two, to get the mean of 45c gas, the rate of the Commission, we have a return of $132,776.00, something more than a 6% return on the trial court's rate base. And this calculation includes, it will be remembered, an annual amortization-extraordinary upkeep charge of $75,000.00, without support in the records.

As explaining away its unwillingness to accept what other investors take in Kentucky, appellant is too loud, we think, in its lamentations over the hazard of its business. The hazard simply does not exist. The supplies

are abundant. The plants are in 91% condition (so says appellant's expert). It delivers at Lexington through a perpetual lease of the distribution system of a corporation with a perpetual franchise there. And here is what this court wrote (in the *Willcox* case, *supra*) of the "hazard" in the business of a gas company similarly circumstanced:

> "In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation which, in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the City of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business."

That should not be difficult to comprehend.

Tenth. In *San Diego Land & Town Co. vs. National City*, 174 U. S. 73, s. c. 43 L. Ed. 1154, this is written:

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property

> under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

Is not it easy to follow that reasoning, and to discover its relevancy?

Eleventh. We bring our own reflections, and invite the minds of the court, back to the fact that the trial court allowed

(a) An annual charge of $50,000.00 to amortize the appellant's properties to "recover the entire investment" in the twenty years of the franchise, with nothing back of it but an empty hypothesis of an expert who says nothing, who knows nothing, about gas supplies.

(b) An annual charge of $10,263.00 to amortize the properties of the Lexington Utilities Company, operated by appellant at an arm's length lease, and of which it owns no part. (The leasing contract appears as pp. 267-274, inclusive, of the record, printed as an appendix.) And we submit again that the incorporation of this $60,263.00, the total of the two allowances for amortization, itself a return of near 2½% on the rate base, is without foundation in the record.

This relevancy and reasoning seem not difficult to discover.

Twelfth. If it be ruled by this court that a trial court has the right to substitute its own independent judgment for that of a due-process fixation by the Kentucky Commission, then we submit that the courts are bound in their approach by an automatic reluctance against interference. We argue as well that decisions

emanating from this Kentucky tribunal have a presumption of correctness behind them. This enunciation of view, it would seem within fair reason, is easy of understanding. And assuredly the relevancy of these authorities, in every one of which there is direct statement of the rule, must be accepted:

Willcox vs. Consolidated Gas Co., 212 U. S. 19, 41, s. c. 53 L. Ed. 382.

Minnesota Rate Cases, 230 U. S. 352, s. c. 57 L. Ed. 1511.

Knoxville vs. Knoxville Water Co., 212 U. S. 1, s. c. 53 L. Ed. 371.

Darnell vs. Edwards, 244 U. S. 564, s. c. 61 L. Ed. 1317.

R. R. Commission vs. Cumberland T. & T. Co., 212 U. S. 414.

Illinois Central R. R. Co. vs. Interstate Commerce Commission, 206 U. S. 441, s. c. 51 L. Ed. 1128.

Thirteenth. The reply brief (p. 37) for appellant makes the point that the franchise agreement for a *pendente lite* 60-cent rate is in some way, or to some extent, proof of an "understanding" that the rates "were to be under the 60-cent conditions." Happily in the writing of the franchise it was foreseen that, sooner or later, the Gas Company would be riding that wagon; and to forestall it, there was written into the very franchise contract itself (Tr. p. 32, Sec. C) an express declaration by the city, in so many words, that any rate in excess of 40 cents was excessive, and that nothing in the franchise should prevent the Commission or the courts from fixing,

or the city from contending for, a lower rate even than that stated.

Fourteenth. Appellant's reply brief concludes with the general and objectionable charge that our brief in chief "is replete with statements for which there is no foundation whatever in the record or in fact." It is not believed by us that appellant's counsel meant to make just that rather inexcusable statement. We remark the significant fact that they designate not one single misstatement of ours. We are not conscious of having made a single one. We do not believe that we made a single one. We leave to the court the propriety of the statement, to the record its accuracy, and to opposing counsel their reflections about it.

Very respectfully,

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